91-746

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOHN C. BEST and GREGORY J. BEWICK,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOINT PETITION FOR WRIT OF CERTIORARI

M. JACQUELINE WALTHER
Counsel of Record
KIELIAN & WALTHER
53 W. Jackson Blvd., Suite 205
Chicago, Illinois 60604
(312) 663-0842
Counsel for Petitioner, John C. Best

GEORGE P. LYNCH
GEORGE PATRICK LYNCH, LTD.
100 W. Monroe St., Suite 1900
Chicago, Illinois 60603
(312) 782-8520
Counsel for Petitioner, John C. Best

JAMES S. MONTANA, JR.
LAW OFFICES OF
JAMES S. MONTANA, JR.
100 W. Monroe St., Suite 1800
Chicago, Illinois 60603
(312) 346-9538
Counsel for Petitioner, Gregory J. Bewick

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED FOR REVIEW

I. Whether the *en banc* majority seriously departed from accepted and usual judicial procedure by sanctioning a situation where, after a seven-week trial in which voluminous documents were in evidence, the prosecutor sent the jurors, for use in deliberations, individual binders containing key government exhibits, selected and arranged so as to suggest guilt, without the knowledge or consent of the district judge or defense counsel.

II. Whether the *en banc* decision, finding no prejudice from the unauthorized presence in the jury room, for use in deliberations, of binders containing documents which summarized the government's theory of the entire case, conflicts with decisions of other circuits, which have found the presence of such condensations to be reversible error.

III. Whether review is required to clarify the standard to be applied and factors to be considered in reviewing the presence of unauthorized material in a jury room, where the lower courts disregarded the fact that every juror used the material, the nature of the material as suggesting guilt, the manner in which the material may have affected the jury deliberations, and the highly improper mode of transmission to the jury.

IV. Whether the *en banc* ruling represents a significant and unwarranted departure from customary judicial practice, by allowing unsworn documents to contradict sworn affidavits.

LIST OF PARTIES TO THE PROCEEDINGS

1. John C. Best, Petitioner

   Counsel for Mr. Best:

   M. Jacqueline Walther
   Kielian & Walther
   53 West Jackson Boulevard
   Suite 205
   Chicago, Illinois 60604
   (312) 663-0842

   George P. Lynch
   George Patrick Lynch, Ltd.
   100 West Monroe Street
   Suite 1900
   Chicago, Illinois 60603
   (312) 782-8520

2. Gregory J. Bewick, Petitioner

   Counsel for Mr. Bewick:

   James S. Montana, Jr.
   Law Office of James S. Montana, Jr.
   100 West Monroe Street
   Suite 1800
   Chicago, Illinois 60603
   (312) 346-9538

3. Paul F. Conarty, Petitioner

   Counsel for Mr. Conarty:

   Mary Ellen Dienes
   120 South Riverside Plaza
   Suite 1150
   Chicago, Illinois 60606
   (312) 207-5454

The Petitioners are all individuals. Mr. Conarty is filing a separate petition for *certiorari*.

4. United States of America, Respondent

Counsel for the United States:

Fred Foreman
United States Attorney
Northern District of Illinois
Jeanne M. Witherspoon
Assistant United States Attorney
219 South Dearborn Street
15th Floor
Chicago, Illinois 60604
(312) 353-5300

Solicitor General
Department of Justice
Washington, D.C. 20530

The parties before the Supreme Court and the parties to the proceedings below are identical, except that the Solicitor General was not involved in the proceedings below. Mr. Conarty was represented by other counsel at trial.

The following persons filed briefs as *amicus curiae* in the United States Court of Appeals, Seventh Circuit, at the rehearing stage:

1. Susan Bogart (the prosecutor at trial)

   Counsel for Ms. Bogart:

   James R. Ferguson
   Sonnenschein Nath & Rosenthal
   8000 Sears Tower
   Chicago, Illinois 60606
   (312) 876-8000

   Gregory C. Jones
   Irving C. Faber
   Grippo and Elden
   AT&T Corporate Center
   Suite 3600
   227 West Monroe Street
   Chicago, Illinois 60606
   (312) 704-7700

2. Illinois State Bar Association

   Counsel for the Bar Association:

   Dennis A. Rendleman
   General Counsel
   424 South Second Street
   Springfield, Illinois 62701
   (217) 525-1760

Neither *amicus* sought the status of parties, but only requested leave to file briefs as *amicus curiae*, pursuant to Fed. R. App. P. 29. Petitioners objected to Ms. Bogart's participation as an *amicus* as, *inter alia*, her interest in this matter solely related to her concerns as an individual. Ms. Bogart also requested, and was allowed, to participate in the oral argument.

TABLE OF CONTENTS

JOINT APPENDIX
(separately bound)

TABLE OF AUTHORITIES

Constitutional Provisions, Statutes, and Rules

Treatises

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOHN C. BEST and GREGORY J. BEWICK,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOINT PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The original appellate opinion, by a unanimous panel of the Seventh Circuit, reversed petitioners' convictions and is reported at 913 F.2d 1179. The panel opinion was vacated and rehearing *en banc* was granted, in an order noted at 924 F.2d 646. The opinion of the Seventh Circuit *en banc*, affirming the convictions by a six to five majority, is reported at 939 F.2d 425. These opinions are reproduced in the joint appendix, which is being filed as a separate document.

JURISDICTION

The panel opinion was entered on July 3, 1990. The government petitioned for rehearing, with suggestion for rehearing *en banc*, within the extended time allotted by the Seventh Circuit. The petition was granted, the panel opinion was vacated, and rehearing *en banc* was ordered on January 25, 1991. The *en banc* opinion, the judgment from which review is sought, was entered on August 5, 1991.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1), and this petition is timely, under Rule 13.1 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No issue is raised as to the constitutionality of any statute.

U.S. Const. amend. V:

> "No person . . . shall be . . . deprived of life, liberty, or property, without due process of law . . ."

U.S. Const. amend. VI:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . trial by an impartial jury . . ."

Fed. R. Evid. 606(b):

> "Upon an inquiry into the validity of a verdict . . . , a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror . . ."

28 U.S.C. § 1746 (1982):

> "Whenever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:
>
> > . . . (2) If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.
> >
> > Executed on (date).
> >
> > (Signature)' "

STATEMENT OF THE CASE

Petitioners John C. Best and Gregory J. Bewick were the president and vice-president of American Heritage Savings and Loan Association (AHSL) (Tr. 4462-63, 4771).

During the early 1980's, AHSL, like many other savings and loan associations, began experiencing serious financial difficulties (Tr. 359-61, 364-65, 557-59, 4484). AHSL ultimately failed in 1984 (Tr. 606).

In its efforts to avoid failure, AHSL's Board of Directors ("the Board") determined that AHSL should dispose of some of its non-earning assets, including real estate (Tr. 4468). Thus, in the early 1980's, AHSL entered into a number of parallel transactions, in which large commercial loans were made conditioned on the debtor purchasing commercial, investment real estate from the association (Tr. 4065-66, 4385).

An indictment was filed against petitioners in 1986, charging various offenses in connection with the parallel transactions and other loans made by AHSL during petitioners' tenure there. The 35-count indictment charged Best and Bewick with conspiracy, mail fraud, a RICO violation predicated on the mail fraud counts, false statements, and receipt and misapplication of funds of a federally-insured savings and loan association (C. 102).

The government's theory of the case was, in essence, that the transactions were shams and that Best and Bewick knew the borrowers were financially incapable of repaying the loans and completing the conditional purchases. Therefore, under the government's view, it was improper for AHSL to take profits and income from these transactions. Most of the indictment was based on this theory. The remaining counts charged petitioners with receiving funds from certain loans.

The defense was based primarily on good faith and a lack of criminal intent. In essence, the defense position was that the transactions represented legitimate, though in hindsight ill-advised, attempts to keep AHSL solvent through extremely difficult financial times. Evidence was presented of petitioners' reliance on the advice of AHSL's attorneys and accountants regarding the transactions, and the Board's knowledge and approval of the transactions. The defense also contended that funds received by petitioners were not loan proceeds, but rather petitioners' bonuses for their work at AHSL. On the other count of receiving loan proceeds, the defense position was that the funds represented repayment of a legitimate personal loan.

The trial, before a jury, lasted seven (7) weeks. During trial, hundreds of documents, filling ten (10) large boxes, were introduced into evidence.

Before jury deliberations began, counsel for both sides reviewed the exhibits to be sent to the jury (Tr. 5959-60). After both sides told the judge that the exhibits which were to go to the jury were segregated, defense counsel left the courtroom, as there was no further business, and deliberations began (Joint Appendix ("A.") 86-87, 112).

Subsequently, unbeknownst to defense counsel, the FBI case agent and the prosecutor loaded certain binders onto a cart with the exhibits which were to be sent to the jurors. The items on the cart were then taken to the jury room (A. 50, 52-53, 55-56, 59-60, 62-64, 67-69, 75-76, 78-79).[1]

The binders were individual books, one for each juror, containing key government exhibits. The binders had been distributed during trial at the government's request, so the jurors could follow along with the testimony when a witness was describing the documents (A. 85-86). During trial the binders were used in this manner, as an aid in understand-

[1] Petitioners have filed a motion to have the binders transmitted to this Court for its review.

ing, during testimony, the descriptions of the documents in the binders (A. 85-86; *see e.g.* Tr. 684-94). The jurors were instructed not to look at any document in the binders unless specifically directed to it (A. 85-86; *e.g.* Tr. 685, 723, 790, 855, 857). Pursuant to the district court's order, the jury did not have the binders during recesses (A. 85-86).

The binders contained the documents the government saw as most important to the case (A. 85). Only some documents concerning the transactions were placed in the binders. No defense exhibits were in the binders. Documents in the binders were arranged to correspond with the transactions to which these documents, in the government's view, related.

The binders themselves were never admitted in evidence.

Defense counsel first learned that the binders were in the jury room four days later, as a result of a chance remark by a United States marshal to one of the defense attorneys (A. 64-65). At that time, the jury was still deliberating.

Defense counsel immediately moved for a mistrial (A. 87-88, 91). The district court reserved ruling, pending the verdict. However, the binders were removed from the jury room, after the jurors were discharged for the evening, without prejudice to the defense objections (A. 95-98).

When the jury returned to resume deliberations, the foreperson immediately inquired about the missing binders. The jury was never told why the binders had been removed. The jury returned a verdict later that day (A. 101, 107).

During a subsequent *voir dire*, every juror indicated that he or she had used the binders during deliberations. The jurors also stated that they had not relied solely on the binders (A. 134-47). The district judge limited the *voir dire* to only those two questions (A. 131-33).

Defense counsel each made offers of proof and filed sworn affidavits regarding the transmission of the binders

to the jury (A. 46-76, 90-93, 107-20). The government did not respond until four weeks later. This response included two documents purportedly signed by the FBI agent and the prosecutor. While these documents were labelled affidavits and recited that they were made on oath, neither document was notarized or made under penalty of perjury (A. 77-83).

Most facts, however, were undisputed. Specifically, the government never requested leave of court to send the binders to the jurors. When defense counsel left the courtroom, the binders were in the jury box, either on the floor or on the jurors' chairs. The exhibits which were to go to the jury had been placed elsewhere in the courtroom. The binders were sent to the jurors after defense counsel left the courtroom. After defense counsel left, the prosecutor and FBI agent took the binders from the jury box and placed them on the cart used to transport exhibits to the jury room. The cart was then taken to the jury room (A. 55-56, 78-79, 81-83).

The defense asserted, and the government did not deny, that the government never indicated to the defense that the binders would be sent back to the jurors. Further, although denied in the unsworn statements of the prosecutor and FBI agent, defense counsel's sworn affidavits indicated that the items which were to go to the jury had been placed on a single spectator bench and that the prosecutor and FBI agent told defense counsel that the items on the bench were the only things the government intended to submit to the jury (A. 48-50, 52-53, 62-64, 67-69, 75-76, 77-80, 81-83, 86-88). The record reveals that the prosecutor represented to the court that the government's exhibits to go to the jury were segregated (A. 87).

Defense counsel's statements and sworn affidavits also described a conversation between a defense attorney and the prosecutor during the conference before deliberations.

Specifically, the defense attorney asked the prosecutor whether she intended to send the binders to the jury for use during deliberations. The prosecutor replied that she did not (A. 63, 92). The defense attorney immediately reported the prosecutor's representations to her co-counsel; another defense attorney overheard the conversation (A. 49, 63, 68).

When defense counsel first told the trial court of these representations, the prosecutor's sole statement was "(j)udge, that's not my recollection at all" (A. 92). The prosecutor made no other representations at the time about what occurred (A. 92). Later, when defense counsel each made offers of proof to the district court (A. 107-20), the prosecutor made no response to the accusations against her (A. 121-23). Rather, she stated: "I don't want to go into that at this point. I think that is a subject for a different day" (A. 123). She persisted in this position even after the district judge expressed his view that whether an agreement had been made was a threshold issue (A. 123-24).

The prosecutor's unverified statement denied that she told defense counsel that she did not intend to send the binders back (A. 81-83). The FBI agent stated only that he did not overhear any discussion of the binders between defense counsel and the prosecutor (A. 77-80).

The government consistently objected to petitioners' requests for an evidentiary hearing on the prosecutor's conduct (A. 90-91, 123-25, 148-51, 158).

The district court denied the defense motions for an evidentiary hearing and for mistrial on the grounds that all the documents in the binders were in evidence and that the jurors had not used them to the exclusion of all the evidence (A. 158-59). Other than to note that all of the documents in the binders were in evidence, the district court did not consider the nature of the binders (A. 158-59).

Best and Bewick were convicted on all counts with which they were charged, except one (A. 38-41). The gov-

ernment sought forfeiture, under RICO, of petitioners' salaries, bonuses, and other funds, including alleged commissions on the transactions at issue (Tr. 6098). The jury returned a verdict for no forfeiture, except one-half of the funds allegedly received from one of the transactions (Tr. 6168). Timely posttrial motions were denied (A. 44).

Best was sentenced to imprisonment for a year and a day. Bewick was sentenced to six months work release. Each petitioner also received a consecutive term of three years probation conditioned on 500 hours public service (A. 38-41).

As the indictment alleged federal crimes, the district court had original jurisdiction. 18 U.S.C. § 3231 (1982). On September 4, 1987, petitioners filed timely notices of appeal from the judgment and commitment orders, entered on August 28, 1987 (A. 38-41). Fed. R. App. P. 4(b) (1982). The Seventh Circuit had jurisdiction under 28 U.S.C. § 1291 (1982). Both petitioners were granted bond pending appeal (Tr. 6322).

A unanimous panel of the Seventh Circuit reversed the convictions, due to the presence of the binders in the jury room. The panel reasoned that the binders were an improper condensation of the evidence and guide to the theory of the prosecution in a close and complex case (Panel op. A. 33-35). The panel viewed the trial court's inquiry into the binders' impact on deliberations as inadequate (Panel op. A. 35-36). The panel also recognized the fact that it was the prosecutor who sent the binders to the jurors (Panel op. A. 32).

After granting rehearing *en banc* (A. 45), the Seventh Circuit, in a six to five decision, affirmed the convictions. The majority concluded that all the documents in the binders were in evidence and that the jurors had not considered the binders alone (Majority op. A. 10-12). The majority declined to address issues of prosecutorial miscon-

duct, stating that "*how* the jurors came to have the binders in the jury room is immaterial" (Majority op. A. 13-14) (emphasis original).

The five dissenting judges focused on the closeness of the evidence, the transmittal of the binders without defense counsel's knowledge, and the nature of the binders as a summary of evidence favorable to the government, suggestively selected and arranged (Dissent A. 15-20). The dissent found that the trial court conducted an inadequate inquiry into the binders' impact on deliberations (Dissent A. 21-22). The dissent characterized "(t)he district court's lack of control over what went to the jury room, the prosecutor's and the FBI agent's failures . . . to attest their affidavits, (and) the prosecutor's opposition to an evidentiary hearing . . ." as "embarrassments to federal justice" (Dissent A. 20).

REASONS FOR GRANTING THE WRIT

SUMMARY OF ARGUMENT

The majority decision of the Seventh Circuit *en banc* has sanctioned a procedure whereby an assistant United States attorney surreptitiously sent to the jury room, for use by the jurors during deliberations, a condensation for each juror of the government's case against petitioners. Even though every juror used the binders during deliberations, the majority disregarded the nature of the binders as suggestive of guilt and the binders' potential impact on deliberations.

The majority reached its conclusion without any consideration of the manner of transmission of the binders to the jurors. Particularly, the majority totally disregarded the prosecutor's undisputed involvement in this situation. The majority also disregarded the sworn affidavits of defense counsel which indicated that the prosecutor had affirmatively misrepresented her intentions regarding the binders.

This result contravenes established rules of procedure and departs from rulings in other circuits. It also establishes a precedent for an extremely, and improperly, narrow inquiry to be made when unauthorized materials are present in the jury room during deliberations.

I.

THE MAJORITY SERIOUSLY DEPARTED FROM ACCEPTED AND USUAL JUDICIAL PROCEDURE BY SANCTIONING A SITUATION WHERE, AFTER A SEVEN-WEEK TRIAL IN WHICH VOLUMINOUS DOCUMENTS WERE IN EVIDENCE, THE PROSECUTOR SENT THE JURORS, FOR USE IN DELIBERATIONS, INDIVIDUAL BINDERS CONTAINING KEY GOVERNMENT EXHIBITS, SELECTED AND ARRANGED SO AS TO SUGGEST GUILT, WITHOUT THE KNOWLEDGE OR CONSENT OF THE DISTRICT JUDGE OR DEFENSE COUNSEL.

Constitutional principles of due process and the right to a jury trial guarantee the defendant in a criminal case the right to a fair and unbiased jury, free from any type of interference in its deliberations. *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966); *Irvin v. Dowd*, 366 U.S. 717, 721-22 (1961); *see* U.S. Const. amend. V, VI. Special care is taken to insure that jury deliberations are untainted by outside influence, as the defendant cannot respond or object, and often is unaware of such influences. *Gibson v. Clanon*, 633 F.2d 851 (9th Cir. 1980), *cert. denied*, 450 U.S. 1035 (1981); *United States v. Thomas*, 463 F.2d 1061 (7th Cir. 1972).

The sanctity of the jury room has been zealously protected by this Court. Thus, any out-of-court contact, direct or indirect, with a deliberating juror concerning the case, is deemed presumptively prejudicial. *Remmer v. United States*, 347 U.S. 227, 229 (1954). Reversal is warranted when a person affiliated with the government has contact with deliberating jurors in a criminal case, even without a showing of any actual discussion of the case. *Turner*

v. Louisiana, 379 U.S. 466 (1965). The government bears a heavy burden to establish that any contact with a deliberating juror is harmless. *Remmer*, 347 U.S. at 229.

This Court's abundant caution in preserving the sanctity of jury deliberations is well warranted. Jury deliberations, and a lack of any interference with those deliberations, are the cornerstone of a fair trial. *See Irvin*, 366 U.S. at 722; *see generally, Duncan v. Louisiana*, 391 U.S. 145 (1968).

Further, it is elementary in our system of justice that a person may be convicted of a crime based only upon evidence presented in open court. *Parker v. Gladden*, 385 U.S. 363 (1966); *Sheppard*, 384 U.S. at 351 (1966). The method of presenting such evidence, in our system, is a trial in open court with the parties represented by counsel and a neutral judge, who determines what information and material may be received into evidence and, later, what may be sent to the jury for its deliberations. Thus, among the reasons that *ex parte* communication with jurors is prohibited is the fact that such communications are not subject to the testing of the adversarial process or the scrutiny of a neutral judge, which our system demands. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 460-62 (1978); *Parker*, 385 U.S. at 364-65; *cf. Sheppard*, 384 U.S. at 351, 360-61.

Our system, though an adversary one, also requires that attorneys conduct themselves fairly and with integrity during litigation. *See* American Bar Association, Model Rules of Professional Conduct, Rules 3.4, 3.5, 4.1, 8.4 (1989). The behavior of a prosecutor is also judged in light of constitutional due process guarantees; thus, the prosecutor may not act in a manner which deprives a criminal defendant of a fair trial. *See Mooney v. Holohan*, 294 U.S. 103 (1935). As this Court recognized decades ago, the prosecutor is the representative of a government whose interest in a criminal prosecution is not that it shall win, but

that justice shall be done. *Berger v. United States*, 295 U.S. 78, 88 (1935).

The majority opinion contravenes each of these fundamental principles of our judicial system. The majority affirms the convictions, in a close and complex case, even though:

1) the sanctity of the jury room was violated by the prosecutor's transmittal of material to a deliberating jury;

2) the district judge's authority was circumvented, when the prosecutor sent material to the jurors without obtaining, or even seeking, leave of court;

3) the prosecutor violated basic principles of justice and fair play by sending material to the jurors, which had not been authorized by the district judge, without the knowledge or consent of defense counsel;

4) the prosecutor may well have actually misrepresented her intentions as to the binders to defense counsel;

5) the binders distorted the evidence.

As the five dissenting judges observed, the circumstances of this case are "embarrassments to federal justice" (Dissent A. 20). Review by this Court is warranted to correct the majority's sanctioning of such a situation.

This case involved a trial on a 35-count indictment, which included charges of conspiracy, a RICO violation, mail fraud, and bank fraud. The evidence presented was both massive and complex. During this seven-week trial, 46 witnesses were called (Tr. 6356-68). Over 600 documentary exhibits, many of which were multi-page group exhibits, were introduced into evidence (Tr. 6369-6445).

These documents filled ten transfer cases; the government's exhibits occupied nine of them. The exhibits included such items as AHSL's complete loan files, regulatory examination reports, a guide to the statutes, regulations, and opinions of the Federal Home Loan Bank Board, appraisals of commercial real estate, minutes of AHSL Board meetings, and responses of AHSL's Board and attorneys to regulatory examinations (Tr. 6369-6445).

The transactions at issue were also complex. Most of the transactions involved commercial real estate, loans for over $1 million, and a requirement that other large commercial properties be purchased as a condition of the loan. Such terms were not uncommon in large commercial transactions (Tr. 2964, 2974, 4066-67), but they were well beyond the experience of an average juror.

The binders sent to the jury condensed the government's theory of the whole case. The binders were much more compact and much less complex than the exhibits. The binders contain relatively understandable documents, about two inches thick.

The binders contained only selected government exhibits, arranged in a manner highly suggestive of guilt.

The binders contained separate sections for each transaction described in the indictment. In each section, the government placed documents which, in its view, related to that transaction. While some documents, *e.g.* loan closing statements, admittedly corresponded to the transactions, there was substantial dispute about the relationship of other documents to the transactions. The most notable example is the government's placement of checks to petitioners and petitioners' bank records, showing deposit of the checks, in sections of the binders. According to the government, the checks represented kickbacks from the transactions. The defense was that petitioners received no money from any transaction and that funds they did receive were not related to any transaction.

The binders contained those documents which the government, from among its exhibits, viewed as most pertinent (A. 85). In other words, the binders contained the documents which were most damaging to the defense. This is especially true of the documents when viewed with each other and in isolation from the other evidence.

The binders contained checks to petitioners, suggesting that petitioners received funds from the transactions. This suggestion impaired the credibility of the good faith defense as to the indictment as a whole. The binders also contained loan closing statements. The government theorized that the failure of the closing statements to list the allegedly related checks to petitioners showed that these payments were improperly concealed (Tr. 5577). However, any such inference depends on an actual correlation between the payments and the transactions, a highly controverted issue of fact.

The binders also juxtaposed loan applications, for large amounts of money, and the borrowers' financial statements, suggesting illiquidity and insufficient cash flow, with documents showing that the loans were never repaid. In some cases, there were also loan modification agreements; these modifications, in hindsight, postponed the defaults on the loans. The impression created by viewing these isolated and juxtaposed documents was that the borrower, who failed to repay, never had an ability to pay the loan, that the loans were highly improper, and that petitioners knew it. This, too, was highly disputed.

Documents were placed, in binder sections corresponding to individual loans, which showed the profits and fees taken by AHSL on the transaction. The report to regulatory agencies for the period in which each loan was made was also found in the binder section for that loan. The government posited that, since the transactions were shams, AHSL should not have recorded profits or fees

on them; thus, according to the government, the reports were false. This, likewise, was a disputed issue of fact.

While it is arguable that these conclusions might have been drawn from the evidence as a whole, other evidence indicated petitioners' good faith. All evidence favorable to the defense was excluded from the binders. However, a great deal of such evidence was presented.

For example, AHSL's Board had considered and approved each of these loans (Tr. 4072, 4074-75, 4386-87, 4392-93, 4420, 4426-27; Best Morrissey 3-10). The loans were made to facilitate commercial development of the property, and they were structured in such a way that repayment would be made as the development was completed and began to generate funds with which to repay the loans. The conditional terms of the loans were part of the loan commitment letters issued to the borrowers (*E.g.* Hilltop 1-E, Rau Farm 1-E). The borrowers were savvy businessmen, who were aware of these terms (*See e.g.* Tr. 1032-33, 2395-96, 2666-67, 3662, 3868-70). Further, petitioners relied on the opinions of AHSL's auditors in deciding whether and how to record profits and fees on the transactions (*E.g.* Bewick Ex. Exam Response 4A, 4B).

As to one loan, alleged to be improper as benefitting someone other than the named borrower, the binders juxtaposed loan origination documents, signed by the named borrower, with checks, for the benefit of others, and with an assignment, to another person, of the beneficial interest in the land trust which was collateral for the loan. This raised the inference proposed by the government. However, prior to making the loan, petitioners received certification from the land trustee that the named borrower was the only beneficiary of the trust (Tr. 2442-43). That certification, and other documents showing petitioners' good faith (*e.g.* Bewick Ex. Rosewood 2), were omitted from the binders.

AHSL's Board and auditors knew of petitioners' mid-year bonuses (Tr. 3146-51, 4065). Such bonuses were customary (Tr. 4723-24, 4797-98, 4806, 4833). Also, the payment which was alleged to be a kickback to Best from a loan transaction was, as the borrower himself testified, really repayment of a legitimate personal loan, unrelated to AHSL or the transaction (Tr. 5202, 5205-06).

Thus, the binders presented a one-sided and very distorted view of the case, highly suggestive of guilt.

The documents in the binders suggest a conclusion on every count of the indictment. Insertion of the checks to petitioners in the binder section for the allegedly related loan suggested that the funds emanated from that transaction. This would allow a conviction on the counts charging receipt of loan proceeds; it also seriously impaired the good faith defense to the indictment as a whole. The apparent gross imprudence of the transactions, or concealment of the true borrower, suggested that the loans constituted a misapplication of funds. *See e.g. United States v. Bailey*, 859 F.2d 1265 (7th Cir. 1988), *cert. denied*, 488 U.S. 1010 (1989); *United States v. Angelos*, 763 F.2d 859, 861 (7th Cir. 1985). It also suggested that the transactions were shams, which was pivotal to the mail fraud and false statements counts. These transactions were overt acts forming the basis for the conspiracy count. A finding of guilt on the mail fraud counts, alleged as the predicate acts for the RICO charge, also virtually directed a finding of guilt on that count.

The *en banc* majority disregards all of this in reaching its conclusion.

Finally, the prosecutor's conduct, a particularly troubling aspect of this case, is totally, and expressly, disregarded by the majority. The majority concludes that "*how* the jurors came to have the binders in the jury room is immaterial" (Majority op. A. 13) (emphasis original).

Thus, the majority gives a license to federal prosecutors, and attorneys generally, to send whatever they want to a deliberating jury, secure in the knowledge that the means by which the jury obtained the material is absolutely irrelevant. *Compare e.g.* American Bar Association, Standards Relating to the Administration of Criminal Justice, The Prosecution Function, Standard 3-5.4 (1979); American Bar Association, Model Rules of Professional Conduct, Rule 3.5.

The majority likewise sets a precedent under which attorneys can never rely on the word of opposing counsel and are responsible for monitoring every move of opposing counsel, as well as the door to the jury room.

An attorney is entitled to rely on opposing counsel to behave ethically, keep his or her word, and refrain from *ex parte* contact with the jury. *See* American Bar Association, Model Rules of Professional Conduct, Rules 3.5, 4.1, 8.4 (1989); *see also Hall v. Iowa*, 705 F.2d 283, 288-89 (8th Cir.), *cert. denied*, 464 U.S. 934 (1983). This is at least equally true of a federal prosecutor, who must refrain from improper tactics to obtain a conviction. *Berger v. United States*, 295 U.S. 78, 88 (1935); *see* American Bar Association, Standards Relating to the Administration of Criminal Justice, The Prosecution Function, Standard 3-1.1, 3-5.4 (1979).

The majority, however, disregards such considerations.

The majority also disregards both the only sworn accounts of what transpired between counsel prior to the submission of the binders to the jury and the uncontroverted facts of the prosecutor's involvement in this submission.

The only evidence presented demonstrates that the prosecutor both expressly and implicitly represented that the government would not seek to send the binders to the jury. As the statements of the prosecutor and FBI agent were never verified under oath (A. 77-83), *see* 28 U.S.C. § 1746 (1982), the only version of the facts which could

properly be considered is that contained in defense counsel's sworn affidavits (*See* argument IV, below).

While petitioners' counsel were fully prepared for, and repeatedly requested, an evidentiary hearing on this issue, the government and this prosecutor consistently, and repeatedly, objected to any evidentiary hearing (*E.g.* A. 107-08, 113-14, 116, 123-25, 149-51, 158). According to the majority, "both parties were prepared to give sworn testimony regarding the defendants' allegations" (Majority op. A. 8). This misstates the situation and ignores the government's and prosecutor's vociferous objections to any evidentiary hearing into the prosecutor's conduct. The district court declined to hold an evidentiary hearing only *after* these objections had been repeatedly made and heard (A. 158-59).

The majority also is unconcerned with the prosecutor's undisputed involvement in sending the binders to the jury surreptitiously and without authorization. Specifically, it is uncontroverted that: 1) while defense counsel were present, the binders were in a location separate and apart from the exhibits which, by agreement, were to go to the jury room (A. 48-49, 50-52, 77-78, 81-82); 2) the government never indicated to defense counsel that it intended to send the binders to the jury (A. 50-53, 77-83); 3) the binders were sent to the jury by the prosecutor and FBI agent (A. 55, 79); and 4) the binders were sent to the jury surreptitiously *after* defense counsel left the courtroom (A. 55, 79). The record reveals that the binders were sent to the jury without leave of court and that the prosecutor represented in court that the government's exhibits were segregated (A. 87-90).

By her involvement in this situation, the prosecutor violated petitioners' constitutional right to due process and to trial by an impartial jury, as well as basic principles of fairness and legal ethics. *See e.g. Turner v. Louisiana*, 379 U.S. 466 (1965); *Irvin v. Dowd*, 366 U.S. 717, 721-22 (1961) (right to trial by jury untainted by outside influ-

ence); *Mooney v. Holohan*, 294 U.S. 103 (1935) (prosecutorial conduct which distorts the case violates due process); American Bar Association, Standards Relating to the Administration of Criminal Justice, The Prosecution Function, Standard 3-1.1, 3-5.4 (1979); American Bar Association Model Rules of Professional Conduct, Rule 3.5, 4.1 (1989).

This would be true, even without any affirmative misrepresentation, given the prosecutor's unauthorized transmittal of the binders and the binders' distortion of the evidence and impairment of the truth-seeking process. *See generally Giglio v. United States*, 405 U.S. 150 (1972); *Miller v. Pate*, 386 U.S. 1 (1967); *Napue v. Illinois*, 360 U.S. 264 (1959); *Mooney v. Holohan*, 294 U.S. 103 (1935). The violation is even more apparent if, as indicated by the only sworn information of record, the prosecutor told defense counsel that she did not intend to have the binders go to the jurors, only moments before she sent them to the jury room. *Compare Smith v. Phillips*, 455 U.S. 209, 220 n. 10 (1982).

II.

THE *EN BANC* DECISION, FINDING NO PREJUDICE FROM THE UNAUTHORIZED PRESENCE IN THE JURY ROOM, FOR USE IN DELIBERATIONS, OF BINDERS WHICH SUMMARIZED THE GOVERNMENT'S ENTIRE CASE, CONFLICTS WITH DECISIONS OF OTHER CIRCUITS, WHICH HAVE FOUND THE PRESENCE OF SUCH CONDENSATIONS TO BE REVERSIBLE ERROR.

Other circuits have reversed criminal convictions when unauthorized material which summarizes the government's case was in the jury room during deliberations. *United States v. Pendas-Martinez*, 845 F.2d 938 (11th Cir. 1988); *United States v. Brown*, 451 F.2d 1231 (5th Cir. 1971); *United States v. Adams*, 385 F.2d 548 (2d Cir. 1967); *Sanchez v. United States*, 293 F.2d 260 (8th Cir. 1961). The Seventh Circuit itself has reached the same conclusion. *United States v. Ware*, 247 F.2d 698 (7th Cir. 1957).

The rationale of these decisions is that providing the jury with such material effectively permits the government's witnesses to accompany the jurors while they decide the case. *Pendas-Martinez*, 845 F.2d at 945; *Ware*, 247 F.2d at 700. Such a procedure entails such an obvious and clear risk of prejudice that reversal is required. *Pendas-Martinez*, 845 F.2d at 945; *Brown*, 451 F.2d at 1234; *Sanchez*, 293 F.2d at 268-69; *Ware*, 247 F.2d at 700. Other courts have recognized such prejudice even where the material was cumulative of other evidence, *Brown*, 451 F.2d at 1234, and even where there was no misconduct involved in its delivery to the jury. *See Sanchez*, 293 F.2d at 267. Further, these cases have involved situations with much less potential prejudice than this one. Here, each juror was furnished with a copy of the binders. Every juror used the binders (A. 135-48). Reversal was found warranted however, even where there was only one unauthorized condensation, and even where it was not known if the jurors used it. *Brown*, 451 F.2d 1231; *Ware*, 247 F.2d at 700-01.

As more fully described in argument I, these binders condense the government's theory of the entire case. Material which condenses one side's theory of the case distorts the deliberative process, by suggesting to the jurors such things as what evidence merits consideration, the sequence in which the evidence should be considered, and the relationship between items in evidence (*See* dissent A. 17-18). Such decisions should, and must, be left to the jurors.

The majority opinion serves as precedent for a contrary rule. Carried to its logical end, the majority opinion would allow the jurors to have a transcript of one side's closing argument, as they considered the evidence and decided on a verdict (*See* dissent A. 17-18).

The majority focuses on the fact that all the documents in the binders were in evidence (Majority op. A. 9-11). However, this is, or should be, equally true of every fact

stated in a closing argument. Further, other cases have expressly rejected the view that a condensation of the government's case is not prejudicial if it is cumulative. *Brown*, 451 F.2d at 1234; *Ware*, 247 F.2d at 700. Such a rationale is unsound, as it allows a court to disregard the nature of the unauthorized material and its potential impact on the jury deliberations (*See* dissent A. 17-18, 21).

Contrary to the majority's view (majority op. A. 12-13 n. 2), the fact that the binders themselves were not in evidence renders them unauthorized (*See* dissent A. 21).

Equally importantly, the fact that the prosecutor never obtained leave of court, or an agreement from defense counsel, to send the binders to the jury room demonstrates that the binders were unauthorized material.

The immediate removal of the binders upon the discovery of their presence in the jury room also indicates that the binders were unauthorized. If the binders had been there legitimately, there would have been no reason to remove them (Dissent A. 18; *compare* majority op. A. 6-7 n. 1, 12-13 n. 2). The prosecutor's acquiescence in their removal (majority op. at 6 n. 1) means little; she may well have acquiesced because she knew that the binders were not properly there. Significantly, the district judge never found that the binders were properly in the jury room, and his order to remove them was expressly made without prejudice to the defense objections to the binders' presence (A. 95-96, 98).

The suggestion that the prosecutor's quick acquiescence in the removal demonstrates that the binders were irrelevant (majority op. A. 13 n. 2) is untenable. If the binders were so irrelevant, the prosecutor never would have waited until defense counsel left the courtroom to send them to the jury.

Contrary to the majority's suggestion (majority op. A. 9), the defense never agreed to the jury's use, without

limitation and during the decision-making process, of a suggestive compilation of key government exhibits. The defense was precluded from voicing any opinion on this issue, or from objecting sooner (*see* majority op. A. 10) by the conduct of the prosecutor. Issues as to the prejudice created by the use of the binders during the decision-making process arose only during deliberations; these problems simply were not presented when the binders were first distributed, given the limited use the government then said was to be made of them (A. 85-86).

Likewise, the jurors' viewing of individual documents in the binders, one at a time, while that particular document was being described by a witness (majority op. A. 9-10), is not the equivalent of leisurely perusing through the documents during the decision-making process, observing the arrangement of the documents in the binders, and deliberating accordingly (*See* dissent A. 17-22). Given the district court's decision that the jurors should not have the binders during recesses (A. 86), this jury had never been free to peruse through the binders, until the prosecutor unilaterally furnished the binders to the jurors for use in deliberations.

The district court's allowance of, and defense counsel's acquiescence in, the use of the binders at trial (majority op. A. 10), cannot be taken as a *carte blanche* allowance of any use of the binders, or of their transmittal to the jury room. It is elementary that not every item used at trial is properly sent to the jury room and that it is the trial judge, not counsel for one of the parties, who decides which items should go to the jury room. *See* M. Graham, Handbook of Federal Evidence § 403.2 (2d ed. 1986). If a restricted use of the binders at trial justifies their transmittal to the jury room (*see* majority op. at 9-11), the majority has created a rule that anything used, in any fashion, at trial can be sent to the jury room for use in deliberations, without any ruling by the district judge. Such a rule is a radical departure from customary pro-

cedure. *Compare* M. Graham, Handbook of Federal Evidence § 403.2 (2d ed. 1986).

III.

REVIEW IS REQUIRED TO CLARIFY THE STANDARD TO BE APPLIED AND FACTORS TO BE CONSIDERED IN REVIEWING THE PRESENCE OF UNAUTHORIZED MATERIAL IN A JURY ROOM, AS THE LOWER COURTS DISREGARDED THE ACTUAL USE, BY EVERY JUROR, OF THE MATERIAL, THE NATURE OF THE MATERIAL AS SUGGESTING GUILT, THE MANNER IN WHICH THE MATERIAL MAY HAVE AFFECTED DELIBERATIONS, AND THE HIGHLY IMPROPER MODE OF TRANSMISSION TO THE JURY.

As argued above, this case involves unauthorized material in the jury room. Consequently, it must be analyzed according to the standards applicable to such cases.

The proper inquiry when unauthorized material is in the jury room during deliberations is whether or not there is a reasonable possibility that the jury's exposure to the material affected the verdict. *United States v. Guida*, 792 F.2d 1087, 1092 (11th Cir. 1986); *United States v. Bruscino*, 687 F.2d 938, 940 (7th Cir. 1982) (*en banc*), *cert. denied*, 459 U.S. 1228 (1983); *United States v. Vasquez*, 597 F.2d 192 (9th Cir. 1979). Inquiry into the nature of the material and its impact on a jury is appropriate and required. *Rushen v. Spain*, 464 U.S. 114, 121 n. 5 (1983); *Smith v. Phillips*, 455 U.S. 209, 215-16 (1982); *Remmer v. United States*, 347 U.S. 227, 229-30 (1954); *see* Fed. R. Evid. 606(b).

In making this determination, the courts must consider such things as the nature of the unauthorized material, the extent of the jurors' exposure to or use of the material, the nature and complexity of the case, and any other factors which might suggest that the material may have affected the verdict. *See generally United States v. Key*, 859 F.2d 1257, 1263 (7th Cir. 1988); *United States*

v. Weisman, 736 F.2d 421, 425 (7th Cir.), *cert. denied*, 469 U.S. 983 (1984); *Vasquez*, 597 F.2d at 194. A jury's actual use of unauthorized material may be conclusive, in and of itself. *Vasquez*, 597 F.2d at 194.

Further, in order to preserve the integrity of the judicial system, courts must consider how the material got to the jury; if the prosecutor is involved in its transmission, there is highly serious misconduct which impacts directly on the truth-seeking process and cannot be ignored. *Bruscino*, 687 F.2d at 939-40.

Whenever unauthorized material is present in the jury room, the government must demonstrate, beyond a reasonable doubt, that its presence did not affect the verdict. *United States v. Tebha*, 770 F.2d 1454, 1456 (9th Cir. 1985); *United States v. Jonnet*, 762 F.2d 16, 19-20 (3d Cir. 1985); *cf. Smith v. Phillips*, 455 U.S. 209, 217 (1982); *United States v. Littlefield*, 752 F.2d 1429, 1431 (9th Cir. 1985); *see also Remmer*, 347 U.S. at 229.

In this case, every juror used the binders (A. 135-48). Some jurors described significant reliance, *e.g.* "(t)he book was always in front of me" (A. 138), "we referred back and forth" (Tr. 146). The binders condensed the government's most damaging evidence against petitioners, and arranged it in a manner highly suggestive of guilt (*See* panel opinion A. 32-35). As noted in argument II, that alone warranted reversal, due to the inherent prejudice of such an item. *See United States v. Pendas-Martinez*, 845 F.2d 938 (11th Cir. 1988); *United States v. Brown*, 451 F.2d 1231 (5th Cir. 1971). The prosecutor herself sent the binders to the jurors (A. 55-56, 79). The evidence was lengthy and complex. The case was close, and petitioners' conduct could well have been found imprudent but not criminal (*See e.g.* panel op. A. 28, 36).

The majority disregards all of this. Like the district judge, the majority considers only two factors, *i.e.* that the jury considered other things in reaching its verdict

and that the documents in the binders were in evidence (Majority op. A. 9-10, 12).

As argued above, however, neither of these factors obviates the distortive and suggestive impact of the binders on the deliberations (*See* dissent A. 21). *See e.g. Brown*, 451 F.2d at 1234. The binders guided the jurors in deciding how to consider the evidence, what evidence was important and what evidence related to the transactions (Dissent A. 17-18).

This distortive impact was enhanced by the easy access which the presence of the binders gave each and every juror to those documents which the government most wanted the jurors to see. The majority rejects the concept that ease of access to key government exhibits is prejudicial (Majority op. A. 10). Petitioners respectfully submit that this view is naive, at best. Ease of access is no small thing to a person who, after having been taken from his or her usual occupation for seven weeks, is confronted with ten large boxes of complex documents which, without the binders, he or she might not know how to approach. The relative convenience of the binders, compared to the exhibits, could only have fostered use of and reliance on the binders and the documents in them (Panel Op. A. 34). *See United States Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 762-65 (1989) (theoretical and practical access differ).

Also, ease of access was not the only claim of prejudice (*Compare* majority op. A. 10). Petitioners have consistently asserted that prejudice inured from the suggestive selection and arrangement of the documents, the provision of personal copies of the binder to each juror, the impact of the binders as guiding the deliberations, and the fact that the binders would, at least subliminally, have encouraged the jurors to disregard exhibits which were not in the binders (E.g. brief at 41-45; A. 87-89, 93-95, 104-07, 113-15, 131, 148-56).

While the exhibits were organized (majority op. A. 10), the mode of organization of the exhibits was far different. The binders were organized according to the transactions at issue in the indictment; the binders contained only selected documents, favorable to the government, which the government believed related to that transaction. The exhibits were organized so as to make them accessible to the attorneys during trial, as the exhibits were being used and admitted.

Thus, for example, in the exhibit boxes, AHSL's file on each loan was intact, and contained those documents which AHSL kept in its loan files. Using the exhibits, the jurors might review any or all of the documents in the loan file. Documents which were the subject of the mail fraud counts, *e.g.* the regulatory reports, were separate. Checks to petitioners and their bank records likewise were separate from the loan files. Unlike the binders, the exhibits did not suggest a relationship of these items to the loans.

Thus, using the exhibits would be far different from using the documents in the binders. The binders suggested to the jury which exhibits to use, which to disregard or consider less important, and a relationship between exhibits. The exhibits themselves would not have done so.

The exhibits also included information favorable to the defense. In using the exhibits, the jury would have encountered such documents.

The majority has not applied the proper standard or considered the proper factors. The proper issue is the manner in which the unauthorized material might have affected the jury's deliberations and verdict. *See United States v. Guida*, 792 F.2d 1087, 1092 (11th Cir. 1986); *United States v. Bruscino*, 687 F.2d 938, 940 (7th Cir. 1982) (*en banc*), *cert. denied*, 459 U.S. 1228 (1983); *United States v. Vasquez*, 597 F.2d 192, 193 (9th Cir. 1979); *see also Remmer*, 347 U.S. 227. This depends on the nature of the material and the jury's use of it.

Further, the prosecutor's involvement in sending the material to the jury cannot properly be ignored. *Bruscino*, 687 F.2d at 939-40.

Given the majority's departure from these precedents, this Court should grant *certiorari* to clarify the standard for review of unauthorized material in the jury room.

IV.

THE *EN BANC* RULING REPRESENTS A SIGNIFICANT AND UNWARRANTED DEPARTURE FROM CUSTOMARY PRACTICE BY ALLOWING UNSWORN DOCUMENTS TO CONTRADICT SWORN AFFIDAVITS.

The majority not only disregards how the binders got to the jury, but also glosses over the allegations of affirmative misrepresentation by the prosecutor (Majority op. A. 13-14). In fact, the majority appears to conclude that there was no misrepresentation (Majority op. A. 14 n. 3).

The majority sidesteps the issue of affirmative misrepresentations ostensibly due to an unwillingness to find facts on appeal (Majority op. at 14). However, the fact that the prosecutor sent the binders to the jury, without leave of court and without the knowledge or consent of defense counsel, was uncontroverted. An appellate court clearly may review the record and determine the legal implications of uncontested facts. *See Maine v. Taylor*, 477 U.S. 131, 145 n. 17 (1986); *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982). Further, reviewing courts, which have broad supervisory powers, *McNabb v. United States*, 318 U.S. 332, 340 (1943), may legitimately consider whether certain behavior constitutes prosecutorial misconduct. *See United States v. Pirovolos*, 844 F.2d 415, 423-26 (7th Cir.), *cert. denied*, 488 U.S. 857 (1988).

Further, in concluding that inquiry into the prosecutor's conduct was unwarranted, the majority really implies that the alleged conduct did not occur (*See* majority op. at 14

n. 5). This is a credibility determination, which an appellate court may not make. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985).[2]

What the majority appears to do is presume credibility based on the side of the case to which the proponents of the information belong. This is a gross departure from the principles of our judicial system. Basically, the majority has presumed that assistant United States attorneys and FBI agents are credible and that defense counsel are not. These presumptions persist even though defense counsel give their statements under oath and the government agents do not. Carried to its logical end, such reasoning would lead to a finding for the government on disputed factual issues every time, as no one, not even officers of the court who swear to the truth of their statements, could effectively contradict the statements, sworn or unsworn, of government employees.

At a minimum, the majority has given evidentiary value to the unsworn statements of the prosecutor and FBI agent, by allowing them to contradict the sworn affidavits of defense counsel (Majority op. A. 5, 14, 14 n. 3). How-

---

[2] In its brief before the panel, the government argued that the unsworn statements of the prosecutor and FBI agent were true and simply denied, without any request for hearing, the facts stated in defense counsel's sworn affidavits (Govt. br. at 88-92, 90 n. 41). Despite this waiver, *see United States v. Dunkel*, 927 F.2d 955 (7th Cir. 1991); *United States v. Smith*, 781 F.2d 184 (10th Cir. 1986); *United States v. Serlin*, 707 F.2d 953, 960 (7th Cir. 1983), the majority considered on rehearing the claims of the government and the prosecutor that an evidentiary hearing was required and that the panel found facts.

Review of its opinion demonstrates that the panel found no facts, but merely noted the serious issues of misconduct raised by the only sworn evidence of record (Panel op. A. 32). The statements of the prosecutor and FBI agent are not notarized or made under penalty of perjury (A. 77-83). *See* 28 U.S.C. § 1746 (1982). Defense counsel filed verified affidavits (A. 46-76) and, as the district court refused to grant an evidentiary hearing, made offers of proof (A. 107-20).

ever, courts have historically required that information be given under oath in order to have any evidentiary value. *Patterson v. Gaines*, 47 U.S. 550, 586 (1848); *United States v. Alfaro*, 919 F.2d 962, 966 (5th Cir. 1990); *United States v. Wellman*, 830 F.2d 1453, 1467 (7th Cir. 1987); *Martz v. Union Labor Life Insurance Co.*, 757 F.2d 135, 138 (7th Cir. 1985); *see Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-58 n. 16, 17 (1970). Traditionally, unsworn statements have not been allowed to contradict sworn affidavits. *Boruski v. United States*, 803 F.2d 1421, 1428 (7th Cir. 1986); *Inmates, Washington County Jail v. England*, 516 F. Supp. 132, 138 (E.D. Tenn. 1980), *aff'd*, 659 F.2d 1081 (6th Cir. 1981). In fact, when faced with sworn and unsworn statements, courts routinely treat the sworn affidavits as true and the unsworn documents as insufficient even to raise an issue as to the accuracy of the facts in the affidavits. *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 585 (8th Cir. 1987), *cert. denied*, 484 U.S. 1010 (1988); *Lew v. Kona Hospital*, 754 F.2d 1420, 1423 (9th Cir. 1985); *United States v. One 1984 Ford Bronco VIN #1FMCU1451EUA85204*, 647 F. Supp. 424, 425-26 (E.D. N.Y. 1987); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986).

The majority ignores this traditional treatment of unverified, unsworn factual allegations and allows the government's unsworn statements to contradict the sworn affidavits of defense counsel. Absent review by this Court, the majority opinion would allow virtually any type of material to contradict sworn evidence. Such a precedent is radically at odds with the way in which courts throughout the nation operate.[3]

---

[3] Actually, the majority disregards the fact that the statements of the prosecutor and FBI agent were unsworn (Majority op. A. 5, 14). That fact, however, is highlighted by both the panel (panel op. A. 31-32) and the dissent (Dissent A. 16). Thus, the unsworn nature of these statements is not buried in the record, but is clear from published opinions in the case.

CONCLUSION

Wherefore, for the foregoing reasons, petitioners, John C. Best and Gregory J. Bewick respectfully request that this Honorable Court grant *certiorari* to review the *en banc* ruling of the Seventh Circuit and, upon such review, reverse their convictions or, in the alternative, reverse their convictions and remand for a new trial.

Respectfully submitted,

M. JACQUELINE WALTHER
Counsel of Record
KIELIAN & WALTHER
53 W. Jackson Blvd., Suite 205
Chicago, Illinois 60604
(312) 663-0842
Counsel for Petitioner,
John C. Best

GEORGE P. LYNCH
GEORGE PATRICK LYNCH, LTD.
100 W. Monroe St., Suite 1900
Chicago, Illinois 60603
(312) 782-8520
Counsel for Petitioner,
John C. Best

JAMES S. MONTANA, JR.
LAW OFFICES OF
JAMES S. MONTANA, JR.
100 W. Monroe St., Suite 1800
Chicago, Illinois 60603
(312) 346-9538
Counsel for Petitioner,
Gregory J. Bewick

(2) (3)

Nos. 91-746 and 91-748

In the Supreme Court of the United States

OCTOBER TERM, 1991

JOHN C. BEST and GREGORY J. BEWICK, PETITIONERS

v.

UNITED STATES OF AMERICA

PAUL F. CONARTY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

ANDREW LEVCHUK
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioners' rights were violated by the jury's consideration during its deliberations of binders containing a selection of government exhibits.

2. Whether the district court conducted adequate voir dire on the extent of the jurors' reliance on the binders of government exhibits.

3. Whether the court of appeals applied the correct standard of review in determining that the presence of the government exhibit binders in the jury room did not require reversal of petitioners' convictions.

4. Whether the district court was required to obtain sworn statements from the prosecutor and the case agent before ruling on the motion for a new trial based on the presence of the exhibit binders in the jury room during deliberations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and rule:

Statutes and rule—Continued: Page

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-746

JOHN C. BEST and GREGORY J. BEWICK, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 91-748

PAUL F. CONARTY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1-22) is reported at 939 F.2d 425. The panel opinion of the court of appeals (Pet. App. 25-36), vacated on rehearing (Pet. App. 45), is reported at 913 F.2d 1179.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 1991. The petitions for a writ of certiorari were filed on November 4, 1991 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners John C. Best and Gregory J. Bewick were convicted of conspiracy, in violation of 18 U.S.C. 371; 14 counts of mail fraud, in violation of 18 U.S.C. 1341; eight counts of misapplication of savings and loan funds, in violation of 18 U.S.C. 657; six counts of making false statements to the Federal Home Loan Bank Board, in violation of 18 U.S.C. 1001; participation by a bank officer in a loan transaction, in violation of 18 U.S.C. 1006; and participating in the affairs of an enterprise through a pattern of racketeering, in violation of the RICO statute, 18 U.S.C. 1962(c). Best was also convicted on an additional count of participation by a bank officer in a loan transaction. Petitioner Paul F. Conarty was convicted of mail fraud; three counts of misapplication of funds; and two counts of making false statements. Gov't C.A. Br. 3-4.

Best was sentenced to a year and a day in prison, three years' probation, and 500 hours of community service. Bewick was sentenced to six months' work release, three years' probation, and 500 hours of community service. Conarty was sentenced to three years' probation and 400 hours of community service. Pet. App. 4. A panel of the court of appeals initially reversed petitioners' convictions. *Id.* at 25-37. On rehearing, the en banc court vacated that decision, *id.*

at 45, and affirmed petitioners' convictions. *Id.* at 1-24.

1. In 1981, the American Heritage Savings and Loan Association (American) was experiencing severe financial difficulties. Best was American's president and chaired its Board of Directors. Bewick was American's executive vice-president and managing officer. Conarty later joined American as its in-house counsel. From 1981 to mid-1983, Best, Bewick, and Conarty engaged in improper transactions in an effort to keep American from failing. Pet. App. 2. Those transactions enabled American to continue its operations one year past the point of insolvency and delayed the takeover of American by federal bank regulators. *Id.* at 4.

American and its subsidiaries owned a large amount of real estate as a result of loan foreclosures. The real estate, known as "real estate owned" or "REO," was undesirable because it was a non-earning asset for American. In order to remove some of the REO from American's books, Best and Bewick arranged to have borrowers acquire the REO. For the down payments on those purchases, the borrowers used as much as was needed of the proceeds of loans from American. That scheme resulted in the sale of REO to borrowers who put no cash down and were typically known by Best and Bewick not to be creditworthy. Best and Bewick also inflated the purchase prices of the REO in order to allow American to record a profit on the sales. Despite the dangerous and improper character of those transactions, which lost money for the bank, Best and Bewick paid themselves large bonuses with funds from a bank subsidiary. Pet. App. 2-3.

In early 1983, Conarty became American's in-house counsel. In that capacity, Conarty participated

in a transaction in which American loaned funds to a partnership, two of whose partners were ineligible to borrow additional funds from the bank. Conarty also knew that one of the partners was involved in bankruptcy proceedings. Although the loan was ostensibly made to purchase real estate owned by American, two of the partners used the loan proceeds to pay off pre-existing, unrelated debts. Conarty was aware of that misuse of bank funds. Pet. App. 3.

2. On April 20, 1987, petitioners' seven-week jury trial commenced. Soon after the trial began, the government provided each juror with a loose-leaf notebook that contained key government exhibits, grouped by transaction. The binders were to be used to help the jurors understand the exhibits as they were described during trial. The trial judge instructed the jurors not to look in the binders until a particular exhibit was admitted into evidence; jurors were then instructed to look at the particular exhibit. The binders were used by the jurors throughout the trial, without objection by petitioners. By the end of the trial, each document in the binders had been admitted into evidence. Pet. App. 4-5, 9-10.

At the conclusion of the trial, the jurors left the binders in the jury box. On June 9, 1987, the prosecutor and defense counsel met to review the nine boxes of government exhibits and the one box of defense exhibits to determine what documents should be sent into the jury room. The boxes were lined up on the spectator bench in the courtroom. According to petitioners' counsel, the prosecutor promised that the binders would not be sent to the jury room. According to the prosecutor, no such promise was made. After the trial judge resolved some minor disputes over the exhibits, defense counsel left the courtroom.

The prosecutor and the FBI case agent then loaded the exhibits, including the binders, onto a cart, which the marshal took into the jury room. Pet. App. 5.

After four days of deliberations, counsel for one of the defendants learned that the binders were in the jury room and moved for a mistrial. The defense asserted that the binders, by emphasizing the government's exhibits, served as roadmaps for conviction. The defense also claimed that the defendants neither knew of nor consented to the jury's use of the binders during deliberations. Pet. App. 5-6, 87-89. With the agreement of the government, the trial judge had the binders removed from the jury room that evening. On the next day of deliberations, the jury returned its verdict. Thereafter, the trial judge individually examined each juror to determine whether any juror had used the binders of exhibits to the exclusion of the original exhibits. Each juror indicated that the binders were used only in connection with the use of the original exhibits. The jurors also indicated that they had examined the original exhibits. *Id.* at 6-7, 134-147. The court denied the motion for a mistrial. *Id.* at 102, 121, 131.

Before sentencing, petitioners moved for a new trial. They contended that the government had engaged in misconduct by misleading the defense about the evidence that would be sent to the jury. Petitioners also argued that the binders had prejudicially influenced the jurors in their deliberations. The district court denied that motion. The court noted that all the exhibits in the binders had been admitted into evidence during the trial; accordingly, there was no concern that jurors had obtained access to materials that were not properly before them. In light of that finding, the court concluded that a hearing on the allega-

tion of government misconduct was not necessary.[1] Pet. App. 7-8, 158.

3. A panel of the court of appeals reversed. Pet. App. 25-36. The panel stated that "in all likelihood the prosecutor dispatched the binders to the jury knowing that they were not supposed to go there." *Id.* at 32. The panel then determined that such conduct would warrant a new trial "if there was a 'reasonable possibility' that the presence of the unauthorized materials affected the jury's verdict." *Ibid.*, quoting *United States* v. *Bruscino*, 687 F.2d 938, 940 (7th Cir. 1982) (en banc), cert. denied, 459 U.S. 1211 (1983). In the court's view, such a possibility existed. Pet. App. 36.

The panel rejected the government's contention that the binders could not have affected the verdict since the documents were in evidence and the binders had been available to the jurors throughout the trial. The panel found that, unlike the boxed exhibits, the binders presented the evidence in a way that was favorable to the government's theory of the case. Pet. App. 32-33. The submission of the binders to the deliberating jury therefore amounted, the panel believed, to a "subtle" form of "jury tampering," *id.* at 35, that warranted reversal.

4. The en banc court vacated the panel decision and affirmed petitioners' convictions. The court noted that the threshold issue was whether the district court "acted reasonably in refusing to set aside the verdict because it found no possible prejudice." Pet. App. 8. Review of the district court's determination, the court noted, was guided by the abuse-of-discretion stand-

[1] The court explained that it was not finding that "the government intentionally actually deposited those jury books in there in order to prejudice the defendants." Pet. App. 129.

ard. In light of the record, the en banc court concluded that the district court had not erred. The court explained:

> [A]ll parties agree that the jury properly could review the exhibits contained in the binders—after all, they openly had been examining those binders, document by document, in the course of the seven-week trial, and by the end of the trial, every document in the binder had been admitted in evidence. Thus, it simply could not have been error for the jury to see the exhibits contained in the binders.

Id. at 9-10.

The court rejected the contention that the binders prejudiced the jury during deliberations because they made it easier for the jurors to follow the government's case, and because the jurors might have viewed the absence of any defense binders as a statement that the defense agreed that the government's binders contained all the relevant evidence. That claim, the court found, ignored the fact that the binders contained only copies of documents admitted in evidence, and that the original exhibits, both the government's and the defendants', were readily available to the jury. The binders were no more "roadmaps to conviction," the court noted, than were the ten boxes of carefully ordered government exhibits. Pet. App. 10.

The en banc court also emphasized that the district court had confirmed, through voir dire of each juror, that the jurors considered all the evidence, not just the binders, in arriving at their verdicts. The trial court's inquiry strengthened the court's belief that "the district court's denial of the defendants' motion for a mistrial was not an abuse of discretion." Pet. App. 12. Because the district court had not erred in finding an absence of prejudice in the jury's consid-

eration of the binders, the en banc court found it unnecessary to review petitioners' claims of prosecutorial misconduct. *Id.* at 13. The court further concluded that the district court had not abused its discretion in declining to hold an evidentiary hearing on petitioners' contention that the prosecutor had improperly sent the binders to the jury room.[2]

ARGUMENT

1. Petitioners contend (91-746 Pet. 10-19; 91-748 Pet. 18-20) that the jurors' use of the jury binders during deliberations violated petitioners' right to due process and to a jury trial. Specifically, petitioners argue that the binders distorted the evidence and were provided to the jury without the consent of the judge or the defendants as the result of misconduct by the prosecutor. That fact-specific contention was correctly rejected by the court of appeals and warrants no review by this Court.[3]

The initial question, as the court of appeals recognized, was whether petitioners suffered any prejudice as a consequence of the jury's consideration of the binders. Pet. App. 8. The conduct of the prosecutor, unless it had an impact on petitioners' sub-

---

[2] Five judges dissented, arguing that the prosecutor had introduced "unauthorized" materials (the binders) into the jury room, and that the consideration of the binders by the jury raised the possibility that petitioners had been prejudiced because the binders contained a "tendentious compilation of exhibits already in evidence." Pet. App. 15-22.

[3] Petitioners have filed a motion in this Court requesting that the clerk of the court of appeals be required to transmit the jury binders to this Court for consideration in connection with the petitions for certiorari. We have no objection to petitioners' motion.

stantial rights, would not warrant reversal of the convictions. Fed. R. Crim. P. 52(a); *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254-255 (1988). That rule applies even when the defendant alleges a due process violation based on the prosecutor's conduct. *United States* v. *Hasting*, 461 U.S. 499, 504-505 (1983); *Smith* v. *Phillips*, 455 U.S. 209, 219 (1982) ("[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor."); see also *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1263-1266 (1991). As both the district court and the en banc court of appeals found, there was no prejudice to petitioners in this case, and a new trial is unwarranted.

Each of the exhibits contained in the binders had been admitted in evidence. Moreover, as the district court noted, the jurors had the binders available "on their laps for almost two months." Pet. App. 103. In those circumstances, the district court reasonably concluded that it need not declare a mistrial simply because the jury saw the binders during deliberations; the court indicated that it "was not error at all by virtue of the fact that every exhibit in that book was received in evidence." *Id.* at 148. The district court was within its bounds in finding that the use of the book would not distort the jury's deliberations. As the Seventh Circuit noted in a related context:

> The trial judge will always be in a better position than the appellate judges to assess the probable reactions of jurors in a case over which he has presided * * *. As we cannot put ourselves in the district judge's shoes in these matters we ought to accept his judgment unless we have a very strong conviction of error.

United States v. *Bruscino*, 687 F.2d 938, 941 (1982) (en banc), cert. denied, 459 U.S. 1211 (1983).

Best and Bewick argue (91-746 Pet. 10-12) that this case is akin to those involving *ex parte* contacts with jurors, or those in which jurors have received erroneously admitted documents or documents that were not admitted at all that described the government's theory of the case. The jury's consideration of binders of evidence that they had been using for weeks, however, is a far different matter from its exposure to outside materials or influences. It is difficult to see how the binders could permissibly be used throughout this lengthy trial (a procedure that petitioners did not challenge) and yet be considered prejudicial when they reached the jury room. Petitioners cite no case, and we know of none, in which a court has reversed a criminal conviction based on the submission to the jury of exhibits bound in a particular form.[4]

---

[4] Each of the cases claimed by petitioners to conflict with the majority's decision (see 91-746 Pet. 19-20; 91-748 Pet. 12) involved the submission to the jury of erroneously admitted documents or documents that were not admitted at all. See *United States* v. *Pendas-Martinez*, 845 F.2d 938, 940-943 (11th Cir. 1988) (reversing convictions due to jury's consideration of inadmissible hearsay statement of Coast Guard officer); *United States* v. *Brown*, 451 F.2d 1231, 1233-1234 (5th Cir. 1971) (reversing convictions due to submission to jury of agent's notes, which were not admitted at trial and were "a neat condensation of the government's whole case against the defendant[s]"); *United States* v. *Adams*, 385 F.2d 548, 549-551 (2d Cir. 1967) (conviction reversed because district court allowed jury to review incriminating writing by government agent that had not been received in evidence); *Sanchez* v. *United States*, 293 F.2d 260, 267-269 (8th Cir. 1961) (reversal for erroneous admission of envelopes bearing hearsay notations by law enforcement agent); *United States* v. *Ware*, 247 F.2d 698, 699-701 (7th Cir. 1957) (same).

Petitioners suggest (91-746 Pet. 17) that "the majority gives a license to federal prosecutors * * * to send whatever they want to a deliberating jury, secure in the knowledge that the means by which the jury obtained the material is absolutely irrelevant." That contention is unfounded. The court of appeals did not hold that extraneous material may be sent to the jury; it held only that, when there is no prejudice to the defendants, the remedy of a new trial is not the proper means to address claims of prosecutorial misconduct. Nor did the court suggest that a prosecutor who circumvents court rules in sending material to the jury would be immune from administrative sanctions within the Department of Justice, or from being chastised in a judicial opinion. These remedies "allow the court to focus on the culpable individual rather than granting a windfall to the unprejudiced defendant" who has been convicted after a fair trial. See *Bank of Nova Scotia* v. *United States*, 487 U.S. at 263.

2. Petitioners assert (91-748 Pet. 11-15) that the district court's voir dire of the jurors was inadequate to ensure that they had not misused the binders during deliberations. The district court asked each juror whether he or she had used the binders and, if so, whether they were used to the exclusion of the other exhibits. See Pet. App. 134-147.[5] In response to the court's questions, the jurors explained that

[5] In asking those questions, the court understood that petitioners' argument was that the binders were "like a government's brief being in the jury room," Pet. App. 130, and the court sought to remove speculation that the binders were used to the exclusion of other evidence. As the court put it, "What I want to know is whether the use of these jury books resulted in their verdict irrespective of what they heard and irrespective of the evidence." *Id.* at 133.

although they used the binders during deliberations, they considered other exhibits "[m]ore so than the book, itself," *id.* at 134, that they "went through the files, and the charts, and everything," *id.* at 137, and that they "were in and out of all of those boxes, many more of those boxes than I suppose you'd even suspect. It was very interesting." *Id.* at 138. One juror explained that "[t]he only time we used the book is when we wanted to get into the file, and that was one item that was in the file. So rather than pass the one item around, everybody looked at the book." *Id.* at 139.

Conarty argues that the district court should have probed further into how each juror used his or her binder. 91-748 Pet. 13-15. That argument comes with poor grace from petitioners, who urged the district court that the only relevant question was whether the jury used the binders; if so, petitioners argued, a mistrial was mandated. Pet. App. 131-133.[6] In sum, once the district court was satisfied that the binders had not led the jury to ignore the evidence contained in the exhibit boxes, the court reasonably concluded that petitioners were not prejudiced. The court was not required to inquire further into the way the jurors used the binders.

3. Petitioners contend (91-746 Pet. 23-27; 91-748 Pet. 15-17) that the court of appeals misapplied the standard for determining whether a new trial was warranted. There is no dispute that the correct standard is whether there was a "reasonable possibility" of prejudice to the defendants from the jury's

---

[6] Although the court indicated that it was willing to inquire whether the jurors looked at defense as well as government exhibits if petitioners' counsel wished, the defense specifically asked the judge not to do so. Pet. App. 141-142.

consideration of the binders. *United States* v. *Bruscino*, 687 F.2d at 940. Petitioners assert, however, that the court of appeals failed to conduct a sufficiently searching inquiry into the possibility of prejudice.

Both the district court and en banc court of appeals considered and rejected the claim that there was a reasonable possibility of prejudice in this case. The district court, which had the greatest familiarity with the contents of the binders and their likely effect on the jury in light of all the circumstances of the trial, found no prejudice "by virtue of the fact that every exhibit in that jury book was received in evidence." Pet. App. 148. The en banc court of appeals similarly rejected the "only contention of prejudice"—that the arrangement of documents in the binders was a "roadmap[]" to conviction. Pet. App. 10. As the court of appeals noted, petitioners did not object when the binders were distributed to the jury during trial; petitioners themselves "frequently directed the jury's attention to the binders in order to focus the jurors on a particular document or transaction"; the district court ascertained that all the exhibits in the binders were admitted into evidence; and the binders had been used by the jurors routinely throughout the seven-week trial. *Ibid.* Against that background, the court of appeals had a sufficient basis for concluding that there was no "reasonable possibility" that the presence of the binders improperly influenced the jury's deliberations.[7]

---

[7] Petitioners cite several court of appeals cases (91-746 Pet. 24) for the proposition that "[w]hen unauthorized material is present in the jury room, the government must demonstrate, beyond a reasonable doubt, that its presence did not affect the verdict." The cited cases, however, do not apply

4. Finally, Best and Bewick argue (91-746 Pet. 27-29) that the district court was required to obtain sworn statements from the prosecutor and the FBI case agent before resolving the motion for a new trial. Both the prosecutor and the case agent submitted statements in the form of affidavits (although they were not notarized), Pet. App. 77-83, and they were prepared to give sworn testimony regarding petitioners' allegations. *Id.* at 8. In light of the court's finding that there was no possibility of prejudice, however, the court correctly concluded that the issue of how the binders got into the jury room had become moot. There was, therefore, no need for the district court to determine the facts surrounding that issue or to consider whether the absence of a notary seal from the governments' initial affidavits should be given any weight.

---

here; in each the jury considered materials that were not admitted into evidence. *United States* v. *Tebha*, 770 F.2d 1454, 1456 (9th Cir. 1985) (consideration by jury of exhibit that was not admitted in evidence); *United States* v. *Jonnet*, 762 F.2d 16, 18-20 (3d Cir. 1985) (entire deposition transcript sent to and used by jury where district court had ruled that only portions of transcript were to go to jury); *United States* v. *Littlefield*, 752 F.2d 1429, 1431-1432 (9th Cir. 1985) (use of issue of *Time* magazine brought in by juror). In this case, the evidence as arranged in the binders had properly been before the jury during the seven weeks of trial.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

ANDREW LEVCHUK
Attorney

JANUARY 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45284